UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 19-35116

EMILY NANOUK,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Alaska, No. 3:15-cv-00221-RRB
District Judge Ralph R. Beistline

PLAINTIFF-APPELLANT EMILY NANOUK'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court, District of Alaska, entered an order pursuant to Fed. R. Civ. Proc. 12(h)(3) finding that the discretionary function exception of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) barred this action on December 12, 2018. ER 3-7. The district court entered a final judgment dismissing the action on subject matter grounds on December 14, 2018. ER 2. Mrs. Emily Nanouk timely filed her Notice of Appeal on February 11, 2019. ER 1. This court has jurisdiction to hear this appeal on the final judgment of the district court pursuant to 28 U.S.C. §§ 1291 and 1294. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and the Federal Tort Claims Act, 28 U.S.C. §§ 1346 (United States as defendant).

STATEMENT OF ISSUES ON APPEAL

1. Whether the district court erred in determining that, as a matter of law, the Government's actions and omissions are protected as discretionary functions of the type that Congress intended to shield from liability?

2. Whether the district court erred in ignoring the government's liability as a landowner?

3. Whether the district court erred in finding that the contractor exception resulted in the district court lacking subject matter jurisdiction?

STATEMENT OF THE CASE

Mrs. Nanouk, an Iñupiat village elder who resides in Unalakleet, Alaska, owns a Native Allotment on land that she used, high over Unalakleet Bay and with an abundance of foods she and her people have subsisted on for thousands of years. In the hills, ptarmigan, spruce hen, porcupine, and moose were plentiful. Wolves travelled in packs and yielded warm furs for the Arctic winters. Fish were plentiful on the North River as it flowed past her allotment. And, there were berries of every description that carpeted her land.

One bright July morning in 2003, Mrs. Nanouk reported a strange smell on the trail leading to her Native Allotment to her Tribal Council representatives. That report changed her life and the lives of members of the Native Village of Unalakleet.

The trail to Mrs. Nanouk's allotment lay across abandoned land that had been used, until 1978, as the North River Radio Relay Station communication site ("NR White Alice"). By 2003, however, the facility was gone. Moreover, the Air Force, the owner of the real property, was in the process of cleaning up the Cold War debris still scattered in and around the abandoned site. The tribal office passed on Mrs. Nanouk's report to the Air Force. Representatives of the Air Force inspected the site, an area that had been demolished, bulldozed, flattened and tested from time to time beginning in the 1980s. The Air Force representatives knew immediately that the area contained concentrations of toxic polychlorinated biphenyls ("PCBs").

The Air Force began testing the area Mrs. Nanouk identified during the summer of 2003 and discovered a massive concentration of PCBs. Over the next several years, the Air Force constructed fencing around the old NR White Alice site, with signs that warned the public not to enter because of hazardous materials. The Air Force also fenced off a portion of Mrs. Nanouk's allotment, again with warnings against entry. The Nome Nugget, a newspaper of general circulation in Alaska's Bering Straits region, interviewed Air Force representatives and reported on the findings and the dangers of PCBs to human health. The danger was further demonstrated to Mrs. Nanouk and the residents of Unalakleet when workers in white hazmat suits, helmets and face masks appeared on site in the remote Arctic Alaska village.

To this day, Mrs. Nanouk does not dare to set foot on her allotment. The six-foot high chain link fence with signs warning of hazardous materials is still standing around much of the perimeter of the NR White Alice site. Mrs. Nanouk's allotment was rendered, in Mrs. Nanouk's opinion, uninhabitable and dangerous to the health of her children and grandchildren.

By the fall of 2003 a full-scale time critical response had commenced. Institutional land use controls on Mrs. Nanouk's allotment, imposed by the government in 2003, continue to this day.

Mrs. Nanouk filed a lawsuit against the United States on November 12, 2015, claiming damages to her allotment in trespass and nuisance arising out of the government's negligence. Following the close of discovery, the government moved to dismiss the action, asserting the government's permissive and liberal spilling of Askerel, a lubricant containing PCBs used in transformers, fell within the government's discretionary function, and, therefore, the court lacked subject matter jurisdiction. The district court agreed. Mrs. Nanouk timely filed her Notice of Appeal to this court on February 11, 2019.

STATEMENT OF FACTS

A. Mrs. Nanouk's Allotment

The Alaska Native Allotment Act of 1906 provided Alaska Natives with an opportunity to own, subject to a restriction against alienation, land they used and occupied. Act of May 17, 1906, Ch. 2469, 34 Stat. 192 (codified at 43 U.S.C. § 270-1 - 270-3 (1970)) (repealed 43 U.S.C. § 1617(a) with savings clause); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), aff'd, 612 F.2d 1152 (9th Cir. 1980). Mrs. Nanouk timely applied for and received an allotment of 160 acres on the North River near Unalakleet, Alaska. ER 10.

Mrs. Nanouk, originally from the tiny Arctic village of Solomon, moved to Unalakleet in 1961, when she married Martin Nanouk. ER 9. Her husband passed away in 1997 from cancer. ER 9. Mr. and Mrs. Nanouk had seven children, six of

whom are still living. ER 9. Her youngest son, Randolph, was disabled at birth and suffered a stroke when he was 46. He is now wheelchair-bound. ER 9.

Mrs. Nanouk and her growing family began using the allotment in the early 1960s. ER 116 ¶ 2. Access was via boat from Unalakleet. ER 10. The allotment, by the river, provided a rich source of fish, greens and berries. ER 10.

B. The White Alice North River Radio Relay Station

On the property next to Mrs. Nanouk's allotment, the government constructed a communications center called the North River Radio Relay Station ("NR White Alice") in 1957, as part of the White Alice Communications System. ER 64; ER 67. The facility was a military installation, initially contracted by the military to the Federal Electric Corporation to provide communications as a commercial operation between Alaska and the Lower 48 states. ER 65-66.

a. The Government's Contractual Obligations

The contract with the government for operations at NR White Alice mandated that the Air Force director of contract services, a government employee, "shall exercise direct operational supervision of and shall monitor the technical performance of the Contractor." ER 80. The contract was a master contract, because the NR White Alice site in Unalakleet, as with all the other White Alice sites throughout the state, was operated by a private contractor. Without question, the responsibility for the sites lay with the Alaska Air Command ("AAC"), United States

Air Force. ER 75; ER 80; ER 83 (point of inspection and acceptance was AAC, reports were submitted to Commander of AAC).

Contractor performance was to be controlled. The operational responsibilities of the contractor were specified in detail in several documents including System Operation and Maintenance Instructions, Air Force manuals in several series, and a series of Operational Procedures. ER 81. Contractors were required to maintain an effective quality control system, ER 82-83, and to maintain fire protection and ground safety programs, including regular safety inspections, ER 84.

The contract provided, in part: "The White Alice Communications System, … is a system of communication stations located in Alaska extending from Cape Lisburne to the Canadian Border and from Shemya to Ketchikan. This communication system is a portion of the Integrated Alaska Communication System and is designed, engineered and installed in accordance with commercial practices comparable to long line communications in the United States." ER 82.

The government furnished petroleum, oil and lubricants to the contractor at the NR White Alice site. ER 76. Lubricants containing PCBs, such as Askerel, were needed for the high temperatures generated by transformers. ER 69 ¶ 8.

The contractor had a duty to maintain, repair and operate "refuse disposal facilities, including incinerators, sanitary fills, burning pits and dumps, and the collection and disposal of refuse and nonaccountable salvage materials." ER 77.

The contractor was required to "assist Air Force representatives in periodic surveys" during site visits and inspections. ER 78. "[J]oint surveys of premises" were to be conducted "upon occupancy of and termination of the contract" for the purpose of ascertaining "the current status and condition of real and installed property." ER 78. The inventories from these surveys were to be "signed by the contractor and competent Air Force authority." ER 78. In addition, the contractor was responsible for policing all areas "in order to maintain all facilities, grounds, roads, etc., in a clean and orderly condition." ER 78. No surveys of the NR White Alice site have been shown to exist.

The contract was updated in 1961. ER 79. The updated contract required the new contractor, Radio Corporation of America, to provide Air Force personnel "access, at any reasonable time, to all records, data and facilities utilized in the performance of this Contract." ER 81. This contract also required the contractor to assist "Department of Defense and/or USAF personnel in periodic surveys and inspections of real and installed property." ER 83. The contractor was specifically responsible for "[m]aintaining and operating refuse disposal facilities, including incinerators, sanitary fills, burning pits and dumps and collecting and disposing of refuse and non-recoverable salvage materials." ER 84. Petroleum, oil and lubricants were to be furnished by the government. ER 85.

b. AFR 19-1

Air Force Regulation ("AFR") 19-1 (first released in 1970), applicable to the NR White Alice site, provided in part:

> As used in this regulation, environmental pollution is the presence of physical, chemical, and biological elements of agents that adversely affect human health or welfare, unfavorably alter ecological balances of importance to human life, adversely affect species of animal or plant life, cause damage to and deterioration of manmade materials or property, or degrade the utility of the environment or aesthetic and recreation purposes.

ER 87 (1974 regulation).

AFR 19-1 required adherence to "the spirit as well as the letter of the National Environmental Policy Act, all other federal and environmental laws, executive orders, regulations, and with criteria and standards published by the Environmental Protection Agency (EPA) …." ER 87. AFR 19-1 applied to all Air Force installations, facilities, and Air Force Reserve and contractor activities performed in Air Force-owned facilities. ER 86. It provides in relevant part for a program of environmental protection as follows:

> Dispose of or discharge pollutants in a manner that will not (a) expose people to concentrations of any agent (chemical, physical or biological) hazardous to health; (b) alter the natural environment so that an adverse effect is created with respect to human health or the quality of life; (c) result in substantial harm to domestic animals, fish, shellfish or wild life; (d) cause economic loss through damage to plants or crops; (e) impair recreational opportunity in natural beauty or cause groundwater contamination.

ER 87 (punctuation edited for clarity).

AFR 19-1 listed nineteen specific acts that were prohibited. AFR 19-1 required specific reports and notifications of pollution incidents, defined as those:

> (1) hazardous to human health and detrimental to aquatic or terrestrial species of plants or animals;
> (2) a threat to or result in contamination of underground or surface water;
> (3) sufficient in the case of oil or other hazardous polluting substances, to cause a film or sheen on or discoloration of the surface of the water or adjoining shore lines or cause a sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines or violates applicable water quality standards.
> (4) a possible cause of unfavorable publicity for the Department of Defense or its agencies.

ER 88.

The reporting requirements were specific. AFR 19-1 Section D, ER 88. In addition to spill reports, environmental status reports were required. ER 88. Indeed, several Air Force Regulations in force while the contractors were operating the site were specific to protection and enhancement of environmental quality, with provisions requiring that the Air Force take steps to avoid pollution and control environmental hazards. *See, e.g.,* AFR 19-1, (Feb. 18, 1972), ER 89; AFR 19-1 (Feb. 20, 1974), ER 86; AFR 161-18 (Oct. 12, 1965), ER 92; AFR 161-22 (Apr. 21, 1966), ER 91; AFR 161-22 (Sept. 23, 1970), ER 90.

c. The Government Failed to Enforce AFR 19-1

Jacob Tuckerman, a government witness, testified to the reckless way the prohibition against pollution was ignored. Tuckerman worked for RCA, the

contractor operating the White Alice sites, from 1961-1965 and was then hired by the United States Air Force, conducting inspections as a civilian "quality assurance representative." ER 68 ¶4. Tuckerman testified that it was not unusual for the contractors to dump transformer oil containing PCBs on the ground. ER 16. The Alaska Air Command itself also noted in 1985 that it was a practice at White Alice sites to throw transformer oil onto the ground. ER 106. Government reports confirm these "characteristic historical hazardous waste management and disposal practices occurred at remote military installations in Alaska." ER 55.

Tuckerman testified that the usual inspection for the quality assurance representative, notwithstanding the mandatory language of the contracts, was to simply walk around, with a notebook, noting the conditions of the site. ER 71-72. In performing the inspections, little attention was paid to the express requirement in military specifications that the contractor's performance was to be:

> …controlled at all points necessary to assure conformance to contractual requirements. The program shall provide for the prevention and ready detection of discrepancies and of timely and positive corrected action. The contractor shall make objective evidence of quality conformance readily available to the government representative. Instructions and records for quality must be controlled.

(MIL-Q-9858A) ER 22.

With the dawn of the space age, the terrestrial-based White Alice communications system was replaced by satellite technology. Congress elected to phase out government involvement and to privatize telecommunications from

Alaska to the Lower 48. *See* Pub. L. 90-135, the Alaska Communication Disposal Act of 1967, November 14, 1967, 81 Stat. 441.

d. Abandonment of NR White Alice

Between 1976 and 1978, the government and its contractors abandoned the various White Alice sites throughout the state, including the NR White Alice site. ER 53-54. By the fall of 1978, the site was completely abandoned. ER 54. The land remained Air Force property. ER 64.

The Air Force attempted to relinquish the NR White Alice site to the Government Service Administration. ER 98. But, that agency refused to accept the site on account of Government Accounting Office's ("GAO") concern over contamination. ER 17-18. The GAO visited some of the White Alice properties, including NR White Alice, and admonished the Air Force for the unsafe and unsecure conditions in a 1981 report titled "Delays in Disposing of Former Communication Sites in Alaska: Millions in Property Lost, Public Safety Jeopardized." ER 97.

In that report, the GAO informed the Air Force that federal property regulations in force prohibited federal agencies from abandoning personal and real property belonging to the government. ER 99. Agencies could not simply abandon personal property. On the contrary, a duly authorized official was required to make

a finding in writing. ER 99-100. The GAO cited the regulations to demonstrate the Air Force's violations: "Abandonment of such property is not authorized." ER 99.

Indeed, the first Air Force visit to NR White Alice following abandonment was in late 1979, after the winter had set in, and over a year after the contractor left. The report of the 1979 visit noted that "[o]pen storage for POL products was in orderly condition. Snow covered the ground and partially covered the drums so there was no way to determine if there were any fuel oil spills." ER 93. The snow-covered Arctic winter would have covered any spills of PCBs, as well. Locks on doors had been broken, some doors were blown open by the wind and were stuck open because of snow drifts, and the site had been ransacked. ER 94. As early as 1980 and for many years thereafter, the government was aware that the site was attracting trespass and vandalism. *See* ER 63; ER 94.

The government, following the site's abandonment, also discovered that there were no records regarding waste management whatsoever. ER 55; ER 8. Nor were there spill logs. ER 113. Yet, in 1983, the village corporation for Unalakleet identified a large spill in what subsequently became area "C" of the NR White Alice remediation area, an area that includes Mrs. Nanouk's allotment. ER 32; ER 102-103. The large spill was composed of PCB contaminants in a former drum storage area which was in the area that became the access point for Mrs. Nanouk's cabin. ER 48.

In 1982, 500 gallons of PCBs were removed from the NR White Alice site, which was noted as abandoned and in a state of disarray. ER 102. Between 1982 and 1985, PCB-laden transformers and additional soil were removed. ER 108. In 1987 and again in 1989, soil samples showed soil contamination throughout the site from hazardous compounds including PCBs, fuel compounds, and pesticides. ER 110. During these periods of PCB removal, Mrs. Nanouk and her family were unknowingly constructing their cabin nearby. ER 11.

The Army Corps of Engineers also conducted a site inventory of the remaining liabilities on the site in 1985. ER 114. The Corps at that time estimated that the site included approximately 6,700 cubic yards of PCBs and other petroleum, oil and lubricant-contaminated soil and approximately 1,830 gallons of liquid waste and scattered asbestos. ER 111. The government eventually hired two contractors in the 1990s to address remediation. ER 19. Both of those contractors went out of business before contract completion. ER 20-21. However, one of the contractors, AECI, prior to its default on the government contract, recommended additional sampling in many areas where PCB contamination remained. ER 57. In 2001, the Army Corps of Engineers reported that the cleanup did not dispose of all of the fuel drums and debris scattered through the site and in the vicinity of Unalakleet. ER 58.

e. 2003: Mrs. Nanouk's Report and USAF Response

In 2003, Mrs. Nanouk, acting upon an alert issued by the Native Village of Unalakleet to report sightings of abandoned fuel barrels, notified Tribal Environmental Specialist Art Ivanoff of an area on the trail to her cabin that had a sweet scent and dead vegetation. ER 117. The resulting tests by USAF personnel demonstrated a hot spot of PCB contamination more than 40,000 times greater than the allowable maximum under the Alaska Department of Environmental Conservation ("ADEC") regulations. ER 40.

Larry Pellegrino, a civilian hazardous material specialist for the 611th, was sent to Unalakleet to inspect Mrs. Nanouk's concern in July 2003. ER 31. Pellegrino testified: "As I recall, I – smelled the strong scent of – I believe it's called askarel. It's a type of solvent [sic] that PCBs are … in, and it has an almondy kind of aroma to it. And I found it there." ER 34. The spill was estimated to have occurred prior to 1984. ER 58.

f. The Government's Belated "Response"

Upon Pellegrino's discovery, the Air Force took steps to prevent any further exposure and to give notice to the public of the grave dangers posed by the contamination. By August 21, 2003, Pellegrino had spoken to the Nome Nugget, which published an article concerning Mrs. Nanouk's allotment and the contamination at the NR White Alice site. ER 37-38. The government commenced

a time critical response action ("TCRA") to remediate the site. ER 40. Four 55-gallon drums of soil were removed from the "hot spot" and additional soil remained on the trail and road. ER 59-60. The remediation and testing continued. By fall 2003, there was little doubt that PCB contamination had reached to the doorstep of Mrs. Nanouk's cabin. ER 33.

As a result, Mrs. Nanouk was required to provide permission to the Air Force to access her property and to place a fence between her cabin and the trail to her cabin. ER 41-46. The government installed a chain link fence six feet high and 1,400 feet long around the contaminated area to prevent public access. ER 60. "Signs warning of the danger of exposure to PCB were posted conspicuously on the fence." ER 60. The fence remains to this day. ER 60; ER 116. After 2005, the government did not return to resample until 2013 at Mrs. Nanouk's request. ER 64.

After PCBs were identified, Mrs. Nanouk became understandably afraid to use her allotment because of the contamination. ER 62. The government has argued in its motions that the area is safe, but these are hollow assurances in the face of government actions. The government instituted institutional land controls in 2003 on Mrs. Nanouk's allotment. ER 115. The government declared Mrs. Nanouk's allotment part of the contaminated area pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (1980) ("CERCLA"). Those CERCLA land use controls have not been removed.

ER 115. Nor has the ADEC issued a decision document or "no further action" letter confirming that no additional remediation is needed. ER 35. Consequently, Mrs. Nanouk's property value has suffered from the stigma associated with the very public remediation efforts. ER 36.

The extent of contamination is still not known, as Mrs. Nanouk identified in her Statement of Genuine Issues of Fact. ER 13-15. Mrs. Nanouk has identified other debris on the allotment from operations at the NR White Alice. ER 49. "As late as 2014 five additional drums with evidence of hydrocarbon contamination in the underlying soil were found southwest of the cabin." ER 49. Some PCBs remain in the vegetation and soils on the allotment. ER 51-52. "Potential exposure to high PCB concentrations on the part of individuals accessing the cabin or moving about the area may have occurred over at least 13 years and perhaps longer." ER 50.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction under the discretionary function exception. *Gatx/Airlog Co. v. United States,* 286 F.3d 1168, 1173 (9th Cir. 2002). "Federal courts are courts of limited jurisdiction" and possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994). Accordingly,

"a federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Federated Tribes,* 873 F.2d 1221, 1225 (9th Cir. 1989). The burden of establishing subject matter jurisdiction rests upon the party asserting jurisdiction. *Kokkonenen*, 511 U.S. at 377.

A challenge to subject matter jurisdiction under Fed. R. Civ. Proc. 12(b)(1) can be either facial or factual. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). In a factual challenge, the government mounts a factual attack. There, the allegations in the complaint are not presumed to be true, and the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). "In response to a factual attack the non-moving party must present affidavits or other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." *Edison v. United States,* 822 F.3d 510, 517 (9th Cir. 2016) (internal quotation omitted). However, "because jurisdictional fact-finding by the court deprives litigants of the protections otherwise afforded by Rule 56," the Court's ability to dismiss claims based on lack of subject matter jurisdiction is limited. *Sun Valley Gasoline, Inc. v. Ernst Enter. Inc.,* 711 F.2d 138, 139 (9th Cir. 1983). Accordingly, "jurisdictional dismissals in cases premised based on federal question jurisdiction are exceptional." *Id.*at 140.

Federal court jurisdiction over the United States is governed by the FTCA. *See United States v. Orleans*, 425 U.S. 807, 814, 96 S. Ct. 1971, 1976, 48 L. Ed. 2d 390 (1976). Under the FTCA, the United States consents to suits only for the negligent and wrongful acts of its employees, *i.e.,* government employees. 28 U.S.C. § 1346(b).

The plaintiff bears the burden of showing "an unequivocal waiver of sovereign immunity by the United States." *Prescott v. United States,* 973 F.2d 696, 701 (9th Cir. 1992). Where the jurisdictional motion "involves issues which also go to the merits" the Court should apply the summary judgment standard, and dismiss only if there is no dispute of material facts and the moving party is entitled to judgment as a matter of law. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (quotation omitted). The United States bears the burden of proving the applicability of the discretionary function exception. *Prescott,* 973 F.2d at 703; *Terbush v. United States,* 516 F.3d 1125, 1128 (9th Cir. 2008). Because the FTCA is intended to remedy harm caused by the government, "it should be construed liberally, and its exceptions should be read narrowly." *Terbush*, 516 F.3d at 1135.

ARGUMENT

A. Summary of Argument

It is undisputed that the United States was the owner of the land upon which NR White Alice was constructed and operated. It is also undisputed that the

government delegated, by contract, the maintenance and groundskeeping of that site, subject to government inspection, supervision and Air Force regulations regarding contamination and reporting of hazardous material spills. It is further undisputed that NR White Alice was abandoned by 1978. The site was contaminated by PCBs, a hazardous material, in excess of 40,000 times the allowable levels under the Alaska Department of Environmental Conservation ("ADEC") standard. The contamination was not discovered until 2003. The government is liable as a landowner for the nuisance and the resulting trespass on Mrs. Nanouk's allotment.

Below, the court determined that the Air Force enjoyed a special exemption for contaminant disposal, holding, "Air Force decisions made during the Cold War regarding contaminant disposal, as well as subsequent environmental remedial efforts, fall within the discretion of the Air Force in terms of the timing, manner, and means of remediation." ER 5. But that holding is simply wrong.

The district court also held that it had no jurisdiction because the contractor exception also applied. ER 6. However, the United States failed to enforce its own contractual and regulatory provisions and, as a result, huge quantities of PCBs were spilled. The contractor exception is inapplicable.

This Court should reverse the district court's dismissal and the case should be remanded, because Mrs. Nanouk carried her burden and the government failed to

establish the lack of subject matter jurisdiction based upon the jurisdictional facts presented.

B. The Discretionary Function Exception Does Not Apply

28 U.S.C. § 2680(a) provides that the government retains sovereign immunity with respect to "any claims … based upon the exercise, performance or failure to exercise or perform a discretionary function or duty on the part of the federal agency." The government asserted, and the district court agreed, that no mandatory statute, regulation or policy prescribed a specific course of conduct sufficient to eliminate governmental discretion with respect to the dumping of toxic PCBs on the ground indiscriminately at the NR White Alice site. The facts contradict the district court's findings.

1. The Gaubert/Berkovitz Test

This court follows a two-step test to determine the applicability of the discretionary function exception. *Gager v. United States,* 149 F.3d 918, 920 (9th Cir. 1998). First, "the exception covers only acts considered discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 1273, 113 L. Ed. 2d 335 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958, 100 L. Ed. 2d 531 (1988)). Under the first step, a requirement of judgment or choice is not satisfied if a federal statute, regulation or policy requires a particular course of action.

Gaubert, 499 U.S. at 322. "If no statute, regulation or policy requires a particular course of action, the discretion exercised must be of the kind that the discretionary function exception was designed to shield." *Id.* at 322 (quoting *Berkovitz*, 486 U.S. at 536). Put another way, the judgments entitled to protection are those "grounded in social, economic, and political policy." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2765, 81 L. Ed. 2d 660 (1984).

2. Statutes, Regulations and Directives Required a Particular Course of Action from the Air Force

As detailed, *supra* pp. 8-10, AFR 19-1 was specific with respect to the requirements for preventing, reporting and responding to pollution instances. ER 87. Those mandatory directives were ignored. Indeed, although the quality assurance officer for the Air Force, Mr. Tuckerman, observed a regular habit by the contractor of spilling PCB's on the ground, he did nothing to prevent or report the same. Yet, during all periods in which the NR White Alice system was operational, government regulations required reports, including pollution incident reports and environmental status reports.

The GAO report, *Delays in Disposing of Former Communication Site in Alaska: Millions in Property Loss Public Safety Jeopardized* found "numerous safety, chemical and environmental hazards at the sites." ER 97. Following the 1978 abandonment, because of lax security, the sites were subject to trespass, thus

posing a danger to the general public. ER 96. The GAO also cited the Air Force's violation of "Chapter 101 of the Federal Property Management Regulations." Specifically:

> The holding agency shall retain custody and accountability for excess and surplus real property including related personal property and shall perform the physical care, handling protection, maintenance and repairs of such property pending its transfer to another agency or its disposal….

ER 99.[1]

Following the contractor's departure, the Air Force did not secure the site. *See* ER 109; *see also* ER 112 (estimated total spillage of 200 gallons of PCBs that were not then either reported or located).

The government has not met its burden of proof to show that the discretionary function should apply. The government has not shown that its failure to comply, and ensure contractors complied, with AFR 19-1 before the site was abandoned, was a decision made with the "discretion of the executive or administrator to act according to one's own judgment in the best course inquiry" rather than mere neglect. *See Dalehite v. United States*, 346 U.S. 15, 34, 73 S. Ct. 956, 967, 97 L. Ed. 1427 (1953). "Thus, the discretionary function exception will not apply when a federal statute,

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[1] In 2005, pursuant to 71 FR 53571, Real Property Management Regulations were moved to 41 C.F.R. Ch. 102, Subt. C and Personal Property Management Regulations were moved to 41 C.F.R. Ch. 102, Subt. B. *See* 41 C.F.R. § 102–2.5 ("The Federal Management Regulation (FMR) is the successor regulation to the Federal Property Management Regulations (FPMR).").

regulation or policy specifically prescribes the course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Berkovitz v. United States,* 486 U.S. at 536, 108 S.Ct. 1958-59.

Nor has the government shown that the failure to secure the site after contractors left – in violation of Federal Property Management Regulations – was a discretionary decision. Here, as established by the GAO report and the subsequent record, the specific directives against abandonment of property were deliberately violated by the United States through its employees. *Cf. Westfall v. Erwin*, 484 U.S. 292, 296, 108 S. Ct. 580, 584, 98 L. Ed. 2d 619 (1988) (government not shielded by discretionary function exception where failure to properly store ash or warn employees was not a decision made as the product of a government policy but was rather negligence). Indeed, the government has presented no evidence that the Air Force made any decisions at all relating to contract termination once the White Alice project was discontinued.

3. The Government's Actions Are Not Based on Policy Decisions

The district court held that the government had established the discretionary function exception. Assuming, *arguendo,* that the failure to take action and to secure the property pursuant to the regulations did not violate Air Force regulations, the government has not met its burden to show that the particular decisions (or lack

thereof) are actually susceptible to policy analysis under the policies as required by step two of the *Gaubert*/*Berkovitz* test.

Where the government asserts the discretionary function exception, each questioned action must be examined separately. *See, e.g., Loughlin v. United States*, 286 F. Supp. 2d 1, 8 (D.D.C. 2003), *aff'd,* 393 F.3d 155 (D.C. Cir. 2004) ("deciding whether the discretionary function exception applies involves a two-step legal analysis, which must be applied separately for each action or omission upon which the claims against the government are based"). Here, the government's actions comprised failures of three types: (1) in failing to oversee the contractors and ignoring the regulations while the site was operational; (2) in failing to secure the sites after the contractors abandoned the NR White Alice site; and (3) failures associated with remediation and response to Mrs. Nanouk's claim.

a. The Government's Actions Are Not Protected Under the Discretionary Function Exception Because They Are Not Permissible Policy Decisions

Even assuming, *arguendo,* that the government's failure to provide oversight and direction and to enforce its regulations regarding contamination of land was the product of judgment or choice, such decisions are simply not protected unless they are grounded in public policy. "Indeed, the Supreme Court has recognized that just because a federal employee exercises some judgment in carrying out his or her responsibilities is not dispositive for application of the discretionary function

exception; otherwise the exception would swallow the general rule permitting tort suits against the government." *Walen v. United States*, 246 F.Supp.3d 449, 464 (D.D.C. 2017). The failure to not only prevent indiscriminate spilling of PCBs but rather to permit contamination, or the failure to provide reports and undertake spill response, are not the kinds of policy decisions that the discretionary function exception is intended to protect. A discretionary decision must still be shown to be susceptible to policy analysis to be protected under the exception.

The Air Force's choices in designing the project and deciding to use contractors are protected discretionary function decisions. *See Terbush*, 576 F.3d at 1131 (design matters involved discretionary decisions by government actors). But, the discretionary function exception does not protect the government's failure in its obligations to routinely supervise the site operations and insure compliance with Air Force regulations.

Bear Medicine is illustrative. The government was excused under the FTCA's discretionary function exception for authorizing a logging contract. *Bear Medicine v. United States*, 241 F.3d 1208, 1217 (9th Cir. 2001). However, the government's failure to monitor the contractor and ensure safety was not excused as discretionary, because it was not a decision grounded in policy. *Id.* The government agency in *Bear Medicine* had a duty of supervision enshrined in contract just as the Air Force did at NR White Alice. *Compare id.* at 1212 *and* ER 80.

Similarly in *McCall*, this Court held that the discretionary function exception did not apply. *McCall v. U.S. Dep't of Energy*, 914 F.2d 191, 196 (9th Cir. 1990). A contractor for the United States failed to maintain a safe workplace during the construction of an electric transmission line. *Id.* This Court reasoned that the implementation of a basic safety measures was not grounded in policy. *Id.* Just as the fact that the site was under the day-to-day control of the contractor did not absolve the government from its responsibilities of supervision and oversight in *Bear Medicine* and *McCall*, the fact that the NR White Alice contractors had day-to-day control of the site does not excuse the Air Force from its contractual supervision duties.

Here, the government was unable to demonstrate that its failure to oversee contractors and ensure compliance with safety and operational concerns was a proper exercise of policy judgment. Mrs. Nanouk presented evidence that, contrary to its own contract requirements, the government did not supervise the contractors. Inspections were neglected, contrary to contract and regulation. Nor was the Air Force absent. It maintained a base a few miles distant from NR White Alice. ER 12; ER 56.

Even if a governmental decision to take action is shielded by the discretionary function exception, "the implementation of that course of action is not." *Whisnant v. United States*, 400 F.3d 1177, 1181-82 (9th Cir. 2005)*; see also Bear Medicine*,

241 F.3d at 1212 (although the government's authorization of contract was a protected discretionary function, failure to monitor contract and ensure safety were not excused as discretionary functions); *Camozzi v. Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 292 (9th Circ. 1989) (government responsible for contractor's safety compliance because United States Postal Service retained safety obligations under the contract). Here, similarly, the United States did not disassociate itself completely from operations at NR White Alice. On the contrary, it imposed regulations and retained oversight, conducted inadequate inspections, and provided supplies, including oils containing PCBs.

b. The "Cold War" Exigency Is Not a Policy Based Reason Entitled to Immunity

The district court found that the government's "decisions made during the Cold War regarding contaminant disposal as well as subsequent environmental remedial efforts fall within the discretion of the Air Force." ER 5. This finding runs directly contrary to the mandatory directives to prevent pollution and to report and respond to contamination. It also runs contrary to Ninth Circuit precedent that matters of professional judgment are rarely susceptible to policy.

In *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1579 (11th Cir. 1992), the United States, through the Defense Property Disposal Service ("DPDS"), entered into a contract to transport PCBs from a military installation. "PCBs are highly toxic chemicals frequently used in electrical transformers." *Id.* The contractor sold the

contaminated waste oil to the plaintiff, Dickerson, contrary to statutes and regulations. *Id*. at 1579-80. Dickerson's storage tanks were heavily contaminated with PCB concentrations of greater than 500 parts per million as a result of the contaminated waste oil. *Id.* at 1580. The government, as here, asserted the independent contractor and discretionary function exceptions. The Eleventh Circuit rejected the argument after examining regulations requiring the use of manifest tracking systems that had been disregarded by DPDS. *Id.* at 1581.

Similary, in *Frasure v. United States*, 256 F.Supp.2d 1180, 1191 (D. Nev. 2003), TNT chemicals were abandoned on government property, resulting in injuries to a child. The *Frasure* court determined that the government's failure to assess environmental dangers and warn the public were not the types of decisions that Congress intended to shield as discretionary functions. *See also Seyler v. United States*, 832 F.2d 120, 123 (9th Cir. 1987) (BIA's failure to provide speed limit signs on agency road was not a decision "grounded in social, economic or political policy"); *W.C. & A.N. Miller Companies v. United States*, 963 F.Supp. 1231, 1240 (D.D.C. 1997) (Army's failure to warn of buried munitions was not discretionary because it was not a decision grounded in policy analysis). Here too, the government, in contaminating and then abandoning its NR White Alice site, knowing that it contained hazardous materials, did not make a decision grounded in policy considerations, and is not entitled to the discretionary function exception.

c. <u>The Government's Decisions as Landowner Are Not Governmental Policy Decisions</u>

The decisions made by the government as a landowner are distinct from those uniquely governmental policy-making duties that are protected under the discretionary function exception. *See, e.g. Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 36 (D.D.C. 2002) (government's decision to put up a support for a tree on its property was not a policy decision). "The danger that the discretionary function exception will swallow the FTCA is especially grave where the government takes on the role of a private landowner." *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002).

In *O'Toole*, the Bureau of Indian Affairs had purchased a ranch and allowed an irrigation system to fall into disrepair "to the detriment of neighboring landowners." *Id.* This Court held that the failure to maintain the property "was not a decision susceptible to policy analysis." *Id.* Nor was such a decision "grounded in social, economic and political policy." *Id.* (citations omitted). Thus, as here, the government's failure to maintain and protect property it owned was not a decision grounded in policy.

d. <u>The Government's Remediation Efforts Are Not Protected by The Discretionary Function Exception</u>

The district court's decision here immunizes the government for "Air Force decisions made during the Cold War regarding contaminant disposal, as well as

subsequent environmental remedial efforts." ER 6. This decision stands in stark contrast to this circuit's holdings. As this Court stated in *McGarry v. United States*, 549 F.2d 587, 591 (9th Cir.1976), such a decision would allow the government to "administratively immunize itself from tort liability under applicable state law as a matter of 'policy.'"

This Circuit's precedent makes clear that "matters of scientific and professional judgments—particularly judgments concerning safety—are rarely considered to be susceptible to social, economic, or political policy." *Whisnant*, 400 F.3d at 1181-82; *see also Bear Medicine*, 241 F.3d 1214 (implementation of a course of action is not a protected discretionary function); *Camozzi*, 866 F.2d at 290 ("a failure to effectuate policy choices already made" is not a protected discretionary function); *Myers v. United States*, 652 F.3d 1021, 1032 (9th Cir. 2011) (even if the Navy had discretion in how to monitor contractor's actions, the "Navy's actions in carrying out its own responsibilities were not protected policy judgments").

Myers makes clear that a "balancing of policy considerations" is a prerequisite to a discretionary decision. 652 F.3d at 1031, citing *Bolt v. United States,* 509 F.3d 1028, 1033 (9th Cir. 2007) (quoting *ARA Leisure Servs v. United States*, 831 F.2d 193, 194 (9thCir. 1987)). In *Myers*, the circuit panel considered a district court's decision to apply the discretionary function much like the one at issue here. 652 F.3d at 1033. The Navy argued that decisions made during its oversight

of contractors and remediation of contaminated soil were protected discretionary functions. *Id.* at 1031. This Court disagreed, finding that such decisions "properly fell within the scope of professional judgments about implementation of the safety plan that were *not* susceptible to public policy considerations." *Id.* at 1032 (emphasis in original).

As applied here, the Air Force was warned in 1980 of the dangers the NR White Alice site posed to human health and the environment. ER 99. Yet, the Air Force failed, for over twenty years, to even locate the "Hot Spot." Then it instituted controls, pursuant to Alaska law, prohibiting entry onto Mrs. Nanouk's property. Then, declaring the response on Mrs. Nanouk's allotment (sampling only the trail) all cleared by 2005, the Air Force resisted for another eight years additional sampling, notwithstanding their knowledge of Mrs. Nanouk's fear. ER 62. Under these circumstances, the government, as in *Myers*, is not entitled to discretionary function exception.

Before the site was abandoned, the area Mrs. Nanouk later complained of was used for fuel barrel storage. ER 33; ER 39. Yet, following the abandonment of the NR White Alice site, despite warning from the GAO, ER 97, despite visits by the Army Corps of Engineers, ER 111, despite a government contractor warning of continued contamination on account of PCBs, ER 57, there was no effort until 2003 to examine the "sweet smell" area. The court below erred in holding those failures

from 1978 through the present were protected under the discretionary function exception.

If the property is, as the government now contends, free of PCB contamination, then the government's decision not to remove the use controls imposed on Mrs. Nanouk's allotment as a part of the CERCLA response cannot be a policy decision for the reasons stated above. The institutional land use controls continue to interfere with Mrs. Nanouk's use and enjoyment of her property. *See* ER 47; ER 52.

The district court here addressed only the discretionary nature of remediation. It erred by not considering the actions that led to the pollution. Pre-abandonment, the evidence demonstrated that the government failed to enforce its own regulations. It failed to secure the property following the abandonment. Thus, even if the government's remediation efforts were discretionary, which they were not, the acts and neglect that allowed the contamination and continuing nuisance were negligent omissions and not decisions of the type the discretionary exception was designed to shield.

C. The Contractor Exception is Inapplicable

The district court below held that the "contractor exception would apply, as well." ER 6. The district court did not provide the basis for this except for a conclusory statement that the contractors had little direct supervision from the Air

Force. Because the Government was the property owner and because it retained (and continues to retain) control and supervision by contract, regulation and statute, the district court erred.

1. The Government's Liability is Premised on the Government's Acts and Omissions

The FTCA's waiver of sovereign immunity extends to acts or omissions by "any contractor with the United States." 28 U.S.C. § 2671. This contractor exception protects the United States from vicarious liability. *See Edison v. United States*, 822 F.3d 510, 518 (9th Cir. 2016). But "the independent contractor exception is not a complete bar to liability any time the United States employs an independent contractor." *Id.* at 514. The exception does not apply to the United States' liability for its own acts or omissions in connection with the conduct of a contractor. *See id.* at 518; *McCall v. U.S. Dep't of Energy*, 914 F.2d at 196.

The FTCA imposes liability on the government in situations where a private person would be liable under state law. 28 U.S.C. § 2674. Where, as here, the government is a landowner, the government has liability not only for its direct actions but for conditions on its property if state law would impose liability on any other landlord. *See e.g.*, *Bolt*, 509 F.3d at 1035 (Army could be liable for a tenant's fall on the ice in a military housing area where Alaska law recognized that landowners had a duty to remove snow and ice from common areas).

2. The Contractor Exception Does Not Apply to the Duties of the United States as Landowner

It is well-established that liability may be imposed on the government under the FTCA by virtue of its status as landowner. *See, e.g.*, *Bartleson v. United States,* 96 F.3d 1270 1274-75 (9th Cir. 1996) (government liable under California law for nuisance when shells fell from military bases onto adjacent landowners' property); *Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011) (Arizona law imposed liability when backfires set by government contractors in national forest spread to neighboring properties). Under Alaska law, landowners may be subject to liability for "a substantial and unreasonable interference with the use or enjoyment of real property." Alaska Stat. 09.45.255; *see also Riddle v. Lanser,* 421 P.3d 35, 45 (Alaska 2018) (finding landowner's noxious smells emitting from storing and spreading of septage constituted nuisance, as interfering with neighbor's use and enjoyment of their property).

Nor does the mere use of a contractor invoke the exception. The government has the same obligation as a private landowner to prevent its premises from causing harm to others, or interfering with the use and enjoyment of property, even when contractors were involved. *See, e.g.*, *O'Toole*, 295 F.3d at 1036-37 (liability might exist where contractor failed to properly maintain land);); *Camozzi v. Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 290 (9th Cir. 1989) (liability existed where Post Office contractors failed to apply floor coverings); *Quechan Indian Tribe v.*

United States, 535 F.Supp.2d 1072, 1123 (S.D. Cal. 2008) (applying Ninth Circuit precedent to find liability for trespass may lie where governmental contractor negligently impacted sites outside of a right of way).

Nor does hiring a contractor eliminate the government's liability where the government's duties are not delegated or are nondelegable. In *Edison v. United States*, 822 F.3d 510 (9th Cir. 2016), this circuit reversed the dismissal of two prisoners' FTCA claims. The prisoners had contracted an infectious disease while incarcerated in a federal prison, and they alleged that the Board of Prisons had failed to adequately warn them of the dangers presented by the epidemic, failed to provide them with a safe and habitable prison, and failed to develop an adequate response to the epidemic. *Id.* at 515-516. This Court reversed the district court, finding that the district court erred in its independent contractor analysis when it failed to address the plaintiffs' arguments. *Id.* at 518-19. Plaintiffs argued that the government had duties that had not been delegated to the contractor and were separate from the day-to-day operation of the prison. *Id*. Similarly, in *Myers*, this Circuit found the Navy's assertions of immunity unavailing when a young girl's guardian brought suit for injuries she suffered as a result of remediation of contaminated soil performed by contractors at Camp Pendleton. 652 F.3d at 1032-1033.

So too, here, the government's duties that stem from its landowner status cannot be passed off to contractors. These are nondelegable and cannot be

contracted away. As the Air Force itself has admitted, the Air Force maintained ownership of NR White Alice and accountability for its condition. ER 104. Like the BIA in *O'Toole* and the Navy in *Myers*, the Air Force had the responsibilities of ownership of the NR White Alice site. And like the Bureau of Prisons in *Edison*, the Air Force here retained responsibility for duties not delegated. And just as the in *O'Toole* the BIA was held to its obligations as a landowner despite hiring a contractor, the Air Force is subject to its obligations as a landowner of the NR White Alice site. If the conditions of the site resulted in nuisance or trespass, then the government is liable in its role as landowner.

3. The Contractor Exception Does Not Apply to the Government's Failure to Oversee the Contractors at the NR White Alice and Failure to Ensure Safe Conditions of Operation

The contractor exception does not protect the government from claims based on the government's own duties, such as those of oversight and supervision. *See, e.g., McCall*, 914 F.2d at 195 ("The United States, therefore, bears liability for the negligence of its own employees in ensuring the taking of safety precautions, rather than vicarious liability for the negligence of its independent contractor."). In *Logue v. United States*, 412 U.S. 521, 532, 93 S. Ct. 2215, 2221, 37 L. Ed. 2d 121 (1973), the Supreme Court noted that although the United States was not liable for the actions of a county sheriff who operated a prison where an inmate took his own life, the United States may be held liable for a negligent failure of its own marshal not to

make specific arrangements for constant surveillance of the prisoner when he placed the prisoner in the sheriff's care.

In *McCall*, this Court held that the United States had a duty to ensure a safe workplace for employees of an independent contractor. 914 F.2d at 196. Therefore, the government could be liable under FTCA for injuries sustained by a worker while he was working on an electrical tower where the working conditions were clearly unsafe. *Id*. *Cf. Howey v. United States,* 481 F.2d. 1187, 1188 (9th Cir. 1973) (in FTCA suit against United States for injuries sustained by contractor's employee at the White Alice site in Aniak, "a government owned communication facility [that] was part of the overall White Alice communications system," United States was held liable and sought an indemnification).

In *Bear Medicine*, the court found that the United States could be liable for FTCA claims when a logger trying out for a job with a contractor was killed and contractor observed poor safety practices. 241 F.3d, n. 2. The contract required the contractor to comply with prescribed safety practices and federal law and reserved a right for the Bureau of Indian Affairs to conduct inspections. *Id.* at 1212.

Here, too, Mrs. Nanouk's claims are based on the Air Force's wrongful conduct. Similar to the situations in *McCall* and *Bear Medicine*, the Air Force had contractual oversight obligations. The Air Force selected contractors first to construct and then to operate the site until operations ceased in the late 1970s. ER

70. The operational responsibilities of the contractor were specified in detail in several documents and are laid out in detail *supra* pp. 5-7. ER 82-85. Contractors were required to ensure that quality control, fire protection, safety programs, an inspection regime, and waste disposal complied with the contracts and applicable regulations and policies. ER 22-30; ER 78; ER 82-83; ER 84. The Regional Air Force Director "shall exercise direct operational supervision of and shall monitor the technical performance of the Contractor." ER 80.

MIL-Q-9858A laid out quality assurance programs for the relevant time period. MIL-Q-9858A was approved by the DOD and mandatory for use by the Air Force. ER 22-30. MIL-Q-9858A "shall apply to all supplies … or services" and required, inter alia, "[t]he quality program shall also include effective execution of responsibilities shared jointly with the Government or related to Government functions, such as the control of Government property and Government source inspection." ER 22.

But, there was no such inspection, control, or oversight. *See supra* pp. 9-12; *see also* ER 16 (contractors dumped lubricants containing PCBs on the ground and there were no provisions for disposal of hazardous waste). Nor was there documentation regarding spills at the sites. *See, e.g.,* ER 70; ER 113. The government, in fact, has admitted it ignored its own rules, stating that refuse and oils were improperly disposed of because "nobody was really watching." ER 105-

106.

Like the agencies in *Bear Medicine* and *McCall*, the Air Force had a contractual duty of oversight and supervision at NR White Alice. And, just as the United States could be liable for the marshal's conduct in *Logue*, the government is liable for the Air Force's failure to fulfill its duties of oversight at NR White Alice.

4. The Contractor Exception Only Applies When There Are Contractors

The contractor left the site in 1978 after the project was terminated by the Air Force. Based on these facts, even assuming, *arguendo*, that the contractor exception applied to the time period of active operations, there is no support whatsoever for the proposition that the contractor exception immunizes the government after 1978.

Nor could contractors be responsible for any failings in the government's omissions, responses, or remediation after Mrs. Nanouk reported the contamination in 2003. The contractor exception does not apply to trespass and nuisance claims based on remediation because remediation was planned and implemented by the government. And the government is not automatically shielded from liability for remediation by the discretionary function exception. *See supra* pp. 30-32; *Myers*, 652 F.3d at 1032 (holding that United States could be liable under FTCA for actions taken during remediation project to remove contaminated soil when a young girl was sickened after exposure to particles in the air).

D. The Issues of Nuisance and Trespass Are Not Resolved and There Continue to Be Ongoing Disputes of Material Fact

Although the government filed a motion for summary judgment with respect to nuisance and trespass, those issues were not ruled upon. Genuine issues of material fact remain regarding the ongoing negligence and trespass. ER 13-15. Mrs. Nanouk is entitled to a remand for purposes of trial.

CONCLUSION

According to the Air Force's own admission:

> Besides abandonment of military facilities and equipment, our own past practices while we operated these sites have now come back to haunt us. It was too costly to haul unneeded barrels of tar, fuels, or solvents back to the main bases – so we left the barrels stacked to rust - or pushed them over a convenient cliff. It wasn't economical to remove old equipment – so we left it were it lay, even at the active installations. And we were ignorant, or nobody was really watching – so we threw samples of transformer oil out the back door. And we dumped our garbage on top of the ground. These are the problems of practices that led Alaska Air Command to the Alaska cleanup effort.

ER 105-106.

The district court erred in holding that the government is entitled to the discretionary function exception and the contractor exception. That holding ignores the facts and places the entire burden for the Cold War defense on Mrs. Nanouk's elderly shoulders. For the reasons stated, the district court's judgment must be reversed.

DATED at Anchorage, Alaska this 12th day of July, 2019

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Alaska Bar No. 8211115

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Alaska Bar No. 1711068

STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6

Counsel for Appellant/Plaintiff is unaware of any related case pending before this, or any other court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-35116

I am the attorney or self-represented party.

This brief contains **9,599 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature s/ Samuel J. Fortier **Date** July 12, 2019
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